

Davis Memorial Goodwill Industries and District Lodge 12, International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner. Case 5-RC-14090

September 8, 1995

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND TRUESDALE

On October 7, 1994, the Regional Director issued a Decision and Direction of Election (pertinent portions are attached as an appendix) finding that the Employer's handicapped workers are employees included in the unit and that the primary and secondary supervisors are statutory supervisors. Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. On November 4, 1994, the Board granted the request for review with respect to the handicapped workers' employee status and the primary and secondary supervisors' supervisory status. Both the Employer and the Petitioner filed briefs on review.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the Regional Director's decision in light of the record and the briefs and has decided to affirm the Regional Director's finding that the handicapped workers are statutory employees, but to reverse the Regional Director's finding that the primary and secondary supervisors are statutory supervisors.²

1. The Petitioner seeks to represent a unit of handicapped and nonhandicapped workers employed at the Employer's project at the Bureau of Engraving and Printing. We agree with the Regional Director for the reasons stated in the attached portion of his decision that the handicapped workers' relationship with the Employer is characterized by business considerations more typical of service employment in the private sector, rather than rehabilitative treatment or therapy. In adopting the Regional Director's decision, we rely additionally on *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987), enf. denied 851 F.2d 180 (8th Cir. 1988); *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979), 248 NLRB 1366 (1980), enf. 696 F.2d 399 (5th Cir. 1983); and *Cincinnati Assn. for the Blind*, 235 NLRB 1448 (1978), 244 NLRB 1140 (1979), enf. 672 F.2d 567 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982). In each of these cases the

Board found the handicapped workers were statutory employees based on such factors as these employees were subject to production standards and discipline, the employer did not provide counseling or social services, and the employer's operation contemplated or resulted in long-term employment for handicapped workers. Here, the Employer's handicapped workers are also subject to productivity standards and discipline, are provided only limited counseling services, and experience long periods of employment. Thus, we find that the Employer's workers are significantly more like the handicapped workers in these three cases than the handicapped workers in *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), and *Goodwill Industries of Denver*, 304 NLRB 764 (1991), which the Regional Director correctly distinguished.³

2. Contrary to the Regional Director, we find that the record fails to establish that the "primary and secondary supervisors" are statutory supervisors. The parties stipulated that the program manager and the assistant manager are statutory supervisors. The Employer operates three shifts, 24 hours a day, 7 days a week. The manager works the day shift and the assistant the second shift, Monday through Friday. The nine primary and secondary supervisors are divided among the shifts. The Employer contends they are nonsupervisory leadpersons; the Petitioner contends they are statutory supervisors.

The facts pertaining to the duties of the primary and secondary supervisors, and others employed by the Employer, are set forth in the attached decision. Briefly stated, the primary and secondary supervisors⁴ generally do not perform unit work but will do so in emergencies or to fill in for an absent employee. They have no authority to hire, fire, suspend, reward, transfer, lay off, or promote employees or effectively to recommend such actions. The Regional Director found that the primary and secondary supervisors have the authority to assign and to responsibly direct employees and to issue warnings. The record, however, fails to

¹ The election was held November 4, 1994, and the ballots were impounded.

² The Employer has requested oral argument. The request is denied as the record and the briefs adequately present the issues and the positions of the parties.

³ The Employer, as an example of alleged errors in the Regional Director's decision, cites the finding that handicapped workers who are incapable of referral to private industry are given priority as elevator operators. Although elevator operators have been given training as custodial employees, the record shows that not all are capable of performing such duties on a regular basis. The sole witness at the hearing, the Employer's vice president for the contracts department, testified that the Employer's policy is to give handicapped individuals who cannot do janitorial work preference as elevator operators and gave as an example a man with a fused back who would never be able to do janitorial work on a consistent basis. The witness also testified that he did not know of any outside job opportunities for elevator operators and the elevator operators are candidates for referral as "custodians."

⁴ The principal difference between the primary and secondary supervisors is that a primary supervisor receives communications from the Government and is in charge of paperwork.

show that they use independent judgment in exercising any such authority.

Work assignments are made in accord with the cleaning program, which is generated by the Employer's contracts division and which is given to the project managers. The managers relay the cleaning program to the primary and secondary supervisors. The cleaning program is based on the units of the building to which the primary and secondary supervisors are assigned. The supervisor for a particular unit of the building makes up a work list based on whoever comes to work, and unless there is a problem or emergency, the employees perform their preassigned duties. Although the supervisor has the authority to temporarily reassign both handicapped and nonhandicapped workers if there is a problem or an emergency, there is no evidence that this occurs other than irregularly. In any event, it is the contracting Bureau of Engraving and Printing that instigates emergency reassignments. The record shows, as an example, that in the case of a burst pipe, the Bureau would request that a crew be pulled to handle the problem. In addition, the primary and secondary supervisors do not have authority to refuse requests for time off. If an employee requests time off, the primary or secondary supervisor merely asks for and records the reason. If none is given, the supervisor issues a warning slip. In these circumstances and in light of the routine nature of the work, we conclude that the evidence fails to show that the primary and secondary supervisors exercise independent judgment in assigning employees.

There is limited, perfunctory testimony that the majority of the time spent by primary and secondary supervisors is on directing employees. Generally, however, any such direction stems from the cleaning program prepared by the contracts division. A supervisor may work with a handicapped employee, who, on a particular day, is not meeting performance expectations by giving the employee "on hand show and tell" to develop better proficiency in the job. Generally, however, the Employer's policy is to have a less proficient handicapped or nonhandicapped employee work closely with a more experienced handicapped or nonhandicapped employee. Based on this limited evidence, we find that the record fails to show that any direction given employees by the primary and secondary supervisors is responsible direction or that the direction requires the exercise of independent judgment.

There is also limited testimony that primary and secondary supervisors have authority to issue warning slips to both handicapped and nonhandicapped employees. The only examples given, however, were that a supervisor would give a warning slip to an employee who punched in late "if appropriate" and would issue a warning slip if an employee gave no reason for requesting time off. There is no evidence that the pri-

mary and secondary supervisors make any recommendations in connection with warning slips. There is, however, testimony that a warning slip is reviewed by a manager who would decide whether to forward it to the head of the contracts division. In light of the evidence that a manager independently reviews warning slips and the lack of evidence that the warnings adversely affect employees, we find that the record fails to show that the primary and secondary supervisors' issuance of warning slips constitutes effective discipline.

For these reasons, we find that the Petitioner has failed to meet its burden to show that the primary and secondary supervisors exercise supervisory authority and shall include them in the unit.

Having found that the handicapped workers and the primary and secondary supervisors are unit employees, we shall remand this proceeding to the Regional Director to take further appropriate action.

DIRECTION

The National Labor Relations Board remands this proceeding to the Regional Director for Region 5 and directs the Regional Director to open and count the unit employees' ballots, to prepare a tally of ballots, and to issue the appropriate certification.

APPENDIX

Handicapped and nonhandicapped workers

Handicapped workers are referred to the Employer by Maryland and Virginia vocational and rehabilitative services, and other governmental and nongovernmental programs. The Employer also receives both handicapped and nonhandicapped employees from the Department of Employment Services. Referrals of handicapped workers are made to the Employer's rehabilitation services division, which performs the intake, tests and evaluates the individual handicaps, and tests employment potential. Nonhandicapped workers are interviewed by the personnel division. Handicapped individuals may undergo weeks, months, or in some cases years of counseling in rehabilitation before being referred to the contract division. This counseling covers such matters as apartment living, punctuality, cleaning techniques, interacting appropriately with staff, and taking instructions. The contract division will not accept handicapped workers who, in the rehabilitation counselor's evaluation, are not capable of performing at a level that is 75 percent of the productivity required of nonhandicapped workers cleaning 29,000 square feet in an 8-hour shift.

The Employer has a full-time rehabilitation counselor who has specialized training in counseling handicapped individuals. This counselor visits the BEP site once a week, and upon the request of handicapped workers, provides one-on-one counseling. The counselor has access to workers' files and knowledge of their handicaps. The counselor does not train workers in their BEP positions, but counsels them on such matters as the importance of punctuality and personal hygiene, personal finances and living accommodations, and

legal problems, and attempts to work with management to resolve job-related problems. The counselor does not see every handicapped worker each week, in part, because the Employer operates three shifts. The record does not show how many handicapped workers receive counseling, although there is evidence that their requests for counseling are "quite regular."

The employee handbook states under the heading, "General Employee Benefits, Job Placement," that:

Usually, handicapped individuals are hired as shelter workers by Goodwill on a temporary basis because employment in an outside industry is the ultimate goal. Goodwill's overall plan is to assist each handicapped employee in finding a job in the Washington metropolitan area by matching his/her abilities to work with the requirements of the specific job.

Goodwill has a placement department with five placement counselors who are responsible for identifying sources of employment in private industry and placing handicapped workers in such positions. All handicapped workers who reach 85 percent efficiency will be referred to other jobs. The amount of time handicapped workers work for the Employer varies. Some stay the entire term of the contract between the Employer and BEP before being referred to other jobs. During the term of the Employer's last contract with BEP, handicapped workers were referred to private industry, but the record failed to establish how many had been referred since 1990 or to where they were referred.

To work at BEP, both handicapped and nonhandicapped workers must complete government security clearance documents and receive government clearance. Once part of the BEP work force, handicapped and nonhandicapped workers perform the same type of cleaning and janitorial work, each worker having a particular assignment. Handicapped and nonhandicapped workers report to the same supervisors, wear the same uniforms and name tags, and receive the same benefits as set forth in the employee handbook.

Based on requirements set by the Department of Labor's (DOL's) Wage Determination Act, nonhandicapped workers are paid \$6.74 per hour from the start of their employment. Handicapped workers' starting rate is \$5 per hour, plus 89 cents per hour for health and welfare benefits, as required by the DOL. Handicapped workers receive this starting rate until their mandatory 6-month evaluation. From that point on, the wage rate for a handicapped worker, except for elevator operators, is adjusted based on the worker's productivity compared to that expected of a nonhandicapped worker. Thus, if the handicapped worker completes 80 percent of the work expected of a nonhandicapped employee, he will be paid 80 percent of \$6.74. Handicapped workers are evaluated every 6 months, in April and October, by a rehabilitation counselor. Each handicapped worker has a "written training program" that is used in the evaluation process to assess the worker's progress. Contract Division Vice President McIntosh signs off on these evaluations that are then placed in the worker's file. Nonhandicapped workers are evaluated annually, on their anniversary dates, by Project Manager Long or by a primary supervisor. Both handicapped and nonhandicapped workers are eligible for an awards program, which may entitle them to a 50-cent-per-hour wage increase.

The Employer's process requires that the employee handbook be distributed to every new worker. The worker then signs an acknowledgment and the Handbook is placed in the employee's file. The handbook contains general personnel policies, including work rules, and notifies employees of disciplinary actions the Employer intends to take for infractions of these rules. The policies apply uniformly to handicapped and nonhandicapped workers. Both groups of workers receive verbal and written warnings for work rule infractions. Handicapped workers are allowed to work at their own pace throughout their employment, but those who do not meet a required 75-percent productivity standard will be additionally counseled by the Employer's supervisors on how to improve performance.

Serious work rule infractions by a nonhandicapped worker will lead to suspension, and ultimately to discharge. Handicapped workers whose performance does not improve through supervisory counseling are referred to the rehabilitation services division. The director for rehabilitation services then evaluates the worker, decides the nature of help needed, and ultimately decides whether to refer the worker to BEP or to place them elsewhere. McIntosh testified that if the manager of the rehabilitation services division "has given up on" a handicapped worker, she may discharge or remove the worker from the contract division, but not from Goodwill. During the term of the Employer's current contract with BEP, some handicapped workers were referred to the rehabilitation division, but the record does not establish how many.

There are approximately 27 elevator operator positions at BEP. These positions are filled by handicapped workers. As required by law, elevator operators are paid the full \$6.74-per-hour wage rate, and receive this amount even on the rare occasions when they perform janitorial work. Unlike janitors, elevator operators are required to receive a 15-minute break every 8 hours. When asked how many handicapped workers were elevator operators, McIntosh testified, "[I]t is our goal for all of them to be The majority of them are. [I]t is our policy that those that are incapable of doing the janitorial are given preference" for the elevator operator positions. Elevator operators are evaluated exclusively on actual performance of the job, and not on their productivity.

Analysis and conclusion

In *Goodwill of Denver*, supra at 765, and *Goodwill of Tidewater*, supra at 768, in making the determination whether individuals are employees within the meaning of Section 2(3) of the Act, the Board stated that:

[T]he Board examines the relationship between the non-profit employer and its workers. When the relationship is guided to a greater extent by business considerations and may be characterized as a typical industrial relationship, statutory employee status has been found. When the relationship is primarily rehabilitative and the working conditions are not typical of private sector working conditions, however, the Board has indicated it will not find statutory employee status.

Applying this standard to the facts of this case, I find that the handicapped workers are employees within the meaning of Section 2(3) of the Act.

The record shows that handicapped workers are required to perform the same work as the nonhandicapped workers. They share the same supervision, hours, and benefits, are subject to the same work rules, receive substantially the same wages, and are eligible for the same performance awards. Although the Employer's handicapped workers are referred to the Employer by state and other agencies for training, counseling, and eventual referral to private industry—as was the case of the handicapped workers in *Goodwill of Denver* and *Goodwill of Tidewater*—significant differences exist here which militate toward finding their relationship is guided to a greater extent by business rather than rehabilitative considerations.

First, the Employer's handicapped workers are subject to the same disciplinary system as nonhandicapped workers. Both handicapped and nonhandicapped workers may be given verbal and written disciplinary warnings for infractions of the Employer's work rules. Second, just as nonhandicapped workers are subject to discharge for serious or repeated infractions of the Employer's work rules, handicapped workers are subject to transfer back to the rehabilitation services division to determine whether additional counseling or removal from the program is warranted. Further, although handicapped workers are not held to the same level of production as nonhandicapped workers, handicapped workers must maintain at least 75-percent productivity for retention at the BEP site.

As in the above-cited *Goodwill* cases, counseling and training is available to the handicapped workers here as part of the Employer's long range objective of preparing the workers for private, competitive jobs. The record however fails to establish that such services are an active part of the handicapped workers' work environment. In this regard, the handicapped workers are taught cleaning and janitorial skills in rehabilitation services division, before referral to BEP. Further, the only designated trainer at the BEP site is the project director and he works the day shift when the least number of workers are on the job. Similarly, the counselor works only the day shift, is responsible for other contract operations, and visits the BEP site only once a week for an hour. The record does not establish that counseling is mandatory. To the contrary, the counseling is available at a worker's request. Further, the record fails to establish that counseling is a significant part of the day-to-day environment for the majority of handicapped workers. In this regard, I note there is very little record evidence showing how many handicapped workers request counseling or how often such requests are made.

This case is also significantly different from the above-cited *Goodwill* cases in that here, of the Employer's 35 current handicapped workers, about 27 function in the position of elevator operator. Concerning this position, the Employer's acknowledged policy is that handicapped workers, incapable of referral to private industry, are given priority placement as elevator operators. This fact strongly suggests that the vast majority of the Employer's handicapped workers are retained for long periods of employment, thereby reducing the number of openings for new referrals from the rehabilitation services division. Such retention is typical of an industrial, private, employment relationship. Also consistent with private industry is the fact that no accommodation for a handicap is associated with the elevator operator position.

Thus, elevator operators are paid the same as nonhandicapped workers, whether they are operating elevators or performing janitorial work. Given the number of handicapped workers holding elevator operator positions, their conceded incapability of referral to private industry, and that there are no productivity variances or allowances for elevator operators to accommodate their handicap, I find their positions in the Employer's work force are more akin to those in private industry and are less rehabilitative in nature. Thus, although the Employer has five job placement counselors, it appears they are of limited service to the handicapped workers at the BEP location.

In summary, I find that the handicapped workers' relationship with the Employer is characterized by business considerations more typical of service employment in the private sector, rather than rehabilitative treatment or therapy. I predicate this finding on the record as a whole, but particularly on the evidence of the similarities in the nature of discipline for handicapped and nonhandicapped workers, the limited use of counseling and training for handicapped workers while at BEP, and the apparent permanence of many handicapped workers in positions where pay is not linked to their handicaps. Accordingly, I conclude the Board's decisions in *Goodwill of Denver* and *Goodwill of Tidewater* are distinguishable, and I find the handicapped workers are statutory employees eligible to vote in the election.

The status of the primary and secondary supervisors

The Employer operates three shifts. The day shift is 6:30 a.m. to 2:30 and has nine janitorial workers. The evening shift is 2:30 p.m. to 11 p.m., and has 30 janitorial workers. The night shift is midnight to 6 a.m., and has 13 janitorial workers. On weekends the shifts have six, eight, and six janitors, respectively. The project manager works the day shift. The assistant manager works the second shift. The manager and assistant manager supervise the primary and secondary supervisors and are responsible for determining that instructions of the contract division vice president are implemented. The nine primary and secondary supervisors are divided among the shifts: the lowest ratio is 6 to 1, the highest ratio is 13 or 15 to 1. Pursuant to government regulation, one primary supervisor on each shift is designated to interact with the customer, BEP, and is responsible for signing inspection forms and responding to cover emergency situations such as cleaning up after a water pipe break.

The employee handbook contains an "Employee classification" that includes the project manager and the assistant manager as "Level I Staff Employees"; the primary and secondary supervisors as "Level II Service Employees"; and the shelter workers a "Level III Shelter Worker[s]." The employee handbook also contains a grievance procedure that is followed at BEP for all workers. This procedure sets out a three-step process. Step one is a meeting with the employee's immediate supervisor. Step two rests with the vice president of the department or the president. The final step rests with the personnel director who is required to form a committee composed of management and employees to resolve the dispute. Contract Division Vice President McIntosh said that supervisors do not have the authority to resolve employee complaints, but if two employees have a disagreement about a work assignment, the supervisor present can resolve it.

On the basis of a BEP requirement, supervisors wear a different uniform to distinguish them from the janitorial workers. Although supervisors' smocks at one time contained the title "supervisor," that is no longer the case. Primary and secondary supervisors are paid 15 percent above the \$6.74-per-hour wage rate paid the nonhandicapped workers and the elevator operators. The supervisors receive the same overtime pay, benefits, and vacation and holiday schedule as other workers.

Supervisors attend supervisory training with the project manager. Other workers do not attend these meetings. Neither managers nor supervisors have the authority to hire or fire workers, or effectively recommend such action. Supervisors do not have the authority to suspend, transfer, or promote workers. The project manager would recommend suspension based on the reports of the supervisors, but McIntosh alone has the ultimate authority to suspend workers. Supervisors do not grant performance awards. Such awards are made by McIntosh on the recommendation of the project manager. Supervisors do have the authority to issue warnings to both handicapped and nonhandicapped workers based on the Employer's work rules. Warnings issued by supervisors are used in evaluating employee performance.

Supervisors are assigned particular areas at BEP, prepare work lists based on the requirements of the Employer's contract with BEP, direct work, and temporarily reassign workers when necessary. Supervisors orient new workers, enforce safety programs, provide instruction on operating elevators, and assist workers in developing better proficiency. In an emergency, a supervisor might fill in for an absent employee and use cleaning equipment or run an elevator, but the supervisor's time is routinely spent directing the work of others.

Supervisors review timecards that are then turned into payroll by the project manager. Supervisors have the independent authority to issue written warnings for late arrival of handicapped and nonhandicapped workers. Workers call in sick to a supervisor, but the project manager has the authority to approve sick leave. If a reduction in force were necessary, McIntosh would decide whom to lay off. The project manager or a primary supervisor writes the evaluations of nonhandicapped workers. If the worker is on a different shift from the project manager, the project manager will base his evaluation on reports from the worker's primary supervisor.

Analysis and conclusion

I find, as stipulated by the parties, that the project manager and the assistant project manager are supervisors within the meaning of Section 2(3) of the Act. I further find that the primary and secondary supervisors are supervisors within the meaning of Section 2(11) of the Act. Accordingly, the program manager, the assistant program manager, and the primary and secondary supervisors are excluded from the unit.

In determining whether a person is a statutory supervisor, the Board holds that a person must possess, only one of the specific responsibilities listed in Section 2(11). Applying Section 2(11) to the duties and responsibilities of any given person requires that the Board determine whether the person in question has authority to use independent judgment on

matters that are less than routine in performing any of the functions listed in Section 2(11) and to do so in the interest of management. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981); *Clark Machine Corp.*, 308 NLRB 555 (1992). In addition, the party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 229-230 fn. 12 (1986). As stated in *Ohio Masonic Home*, 295 NLRB 390, 393 (1989): "in representation proceedings such as this, the burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979)." Accord: *Dickinson-Iron Agency*, 283 NLRB 1029, 1034 (1987). Furthermore, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Primary and secondary supervisors have the independent authority to issue verbal and written warnings to workers for infractions of the Employer's work rules, and these warnings are relied on by the project manager in evaluating worker performance. Except in emergency situations, supervisors direct, rather than perform, unit work. While cleaning assignments are generally routine, the record establishes that the primary and secondary supervisors responsibly assign and direct the workers in the performance of their duties, orient new workers, and implement safety procedures. The supervisors are also called on to use discretion and independent judgment regarding the reassigning work as the need arises, inspecting work performance, and instructing workers on ways to improve their performance. Additionally, supervisors wear uniforms different from those worn by other workers, and are paid a rate 15 percent higher than other workers. Further, although individuals are designated primary and secondary supervisors, the only distinction between these designations is that primary supervisors have the additional responsibility of serving as the Employer's liaison with BEP, and in many instances, of preparing written evaluations for the nonhandicapped workers. Moreover, several supervisors work their crews at night when the project manager and the assistant project manager are not present to direct work. Thus, if the primary and secondary supervisors were in the unit, this would leave only the project manager and the assistant project manager—2 stipulated supervisors—to direct a work force of 60 employees, resulting in a supervisor-to-employee ratio of 1 to 30. Particularly in light of the high percentage of handicapped workers in the Employer's work force at BEP, I find this ratio is unreasonable. See *Garney Morris, Inc.*, 313 NLRB 101, 114 (1993); *Northcrest Nursing Home*, 313 NLRB 491, 498-499 (1993).

I find, rather, that the primary and secondary supervisors exercise independent judgment and discretion, in the interest of the Employer, and that they are supervisors within the meaning of Section 2(11). Accordingly, they are excluded from the unit and ineligible to vote.